Judicial Proceedings Involving International Issues

I. Discovery Abroad in Civil Litigation

The internationalization of the U.S. securities markets has created enormous enforcement challenges. In particular, it has required the Securities and Exchange Commission (SEC or Commission) regularly to seek to obtain information and documents from abroad. This article focuses on the conflict with foreign law issues that often arise in judicial proceedings involving attempts to obtain information and documents located outside the United States. Courts generally have resolved such conflicts in favor of U.S. enforcement efforts, based in large part on findings that both personal and subject matter jurisdiction are beyond dispute and the prejudice or harm that could result from the information and documents not being produced.

For example, in the two *Bank of Nova Scotia* cases discussed below, the Eleventh Circuit concluded that U.S. interests in enforcing its securities and tax laws outweighed the interests of the Cayman Islands and the Bahamas in bank secrecy.[129] In *In re Sealed Case*, also discussed below, with facts very similar to those in the *Bank of Nova Scotia* cases, the D.C. Circuit concluded that the facts did not justify compelling the foreign bank to violate a foreign country's banking secrecy laws.[130] It appears that in *In re Sealed Case*, there was insufficient evidence of the government's overriding interest in compelling the bank to comply with the subpoena, and the government's position was weakened by the court's finding that the bank acted in good faith. In an action brought by the Commodity Futures Trading Commission (CFTC), a district court in the Ninth Circuit applied a comity test based on the *Restatement (Second) of the Foreign Relations Law of the United States (Restatement (Second))* and the *Restatement (Third) of the Foreign Relations Law of the United States (Restatement (Third))*, and ordered

129. *See* cases cited *infra* notes 139, 141 and accompanying text.
130. *See infra* note 146 and accompanying text.

the U.S. branch of a Swiss bank to produce documents held at the Panama subsidiary of the bank.[131] The recurring conflicts and the need for greater certainty in obtaining foreign-based information highlight the increasing need for international cooperation and agreements to avoid these conflicts.

The cases discussed in this article reflect the evolution of thinking by U.S. courts in considering these issues. Although the authors find it difficult to draw a general conclusion from these disparate cases, it appears that as conflicts arise from increased transnational activities, including conflicts over the U.S. securities markets, U.S. courts are disinclined to cede jurisdiction. Thus, when a party to a proceeding or a witness holds critical evidence but asserts foreign blocking or secrecy laws, it faces a substantial risk that the court will assert its jurisdiction and compel the production of the evidence.

A. Discovery Obligations of a Party or of a Witness Subject to U.S. Jurisdiction

In *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*[132] a Swiss holding company brought suit under the Trading with the Enemy Act, seeking the return of property seized by the Alien Property Custodian during World War II. The Swiss Government had constructively seized certain records held in a Swiss bank to prevent their disclosure pursuant to discovery requests in a U.S. court, because the Swiss court held that production of the records would violate Swiss penal law. The question before the Supreme Court was what, if any, sanctions were appropriate against the plaintiff for failure to produce the records. The U.S. Supreme Court held that, although the documents in question had been constructively confiscated by foreign government authorities, the petitioner had control of them and thus was required to respond to a document production request pursuant to Rule 34 of the Federal Rules of Civil Procedure. The petitioner retained actual possession of the documents; consequently, the burden of legal obstacles imposed by Switzerland on U.S. court procedure should be borne by the Swiss holding company.

The Court stated that if a party had "deliberately courted [foreign] legal impediments," it might not escape sanctions despite its inability to comply as the result of foreign legal impediments.[133] But, in the absence of a showing of bad faith, the Court held that U.S. courts may not employ the ultimate sanction of dismissal with prejudice, but may only use sanctions to offset any evidentiary advantage attained by the foreign litigant by reason of foreign law.[134]

The *Restatement (Second)* helped focus the analysis of a litigant's failure to comply fully with discovery by reason of foreign law. First, it clarified in section

131. *See infra* note 159 and accompanying text.
132. 357 U.S. 197 (1958).
133. *Id.* at 208-09.
134. *Id.* at 212-13.

39 that the mere existence of a foreign law that presents a conflict in an area of concurrent jurisdiction does not divest one state of jurisdiction. Rather, as set forth in section 40, both states must then consider certain moderating factors when they exercise jurisdiction in areas where conflicts may arise. Such factors include: vital national interests of each of the states; the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person; the extent to which the required conduct is to take place in the territory of the other state; the nationality of the person; and the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state. The subsequent development of the law, discussed below, has tended to focus on the first two factors, as well as the question of good faith addressed in *Société*.

The *Restatement (Third)* departs from the comity approach of the *Restatement (Second)* and establishes modified standards for ordering discovery of evidence located abroad.[135] Although the *Restatement (Third)* has been criticized by some courts, as discussed below, the standards enunciated in section 442(1)(c) have been adopted by the Supreme Court as "relevant to any comity analysis."[136] However, the modifications to the *Restatement (Second)* do not appear to have altered significantly the courts' approach to international matters.[137]

The following discussion highlights several of the many cases that address the issue of discovery of evidence located abroad.[138] In *In re Grand Jury Proceedings, United States v. The Bank of Nova Scotia*[139] the district court held in civil contempt a bank that had produced documents from the Bahamas and Cayman Islands to a grand jury piecemeal and after substantial delay. The court levied a fine, which

135. As to requests for disclosure, the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (1987) provides as follows:

> In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

136. *See* Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 544 n.28 (1987).

137. *See* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148 (2d Cir. 1984); Minpeco S.A. v. Conticommodity Serv., Inc., 116 F.R.D. 517 (S.D.N.Y. 1987); United States v. Davis, 767 F.2d 1025 (2d Cir. 1985); Plessey Co. plc v. General Elec. Co. plc, 628 F. Supp. 477 (D. Del. 1986).

138. *See also* United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968); *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992 (10th Cir. 1977); United States v. Vetco Inc., 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); United States v. First Nat'l Bank of Chicago, 699 F.2d 341 (7th Cir. 1983); United States v. Toyota Motor Corp., 569 F. Supp. 1158 (C.D. Cal. 1983); Hongkong & Shanghai Banking Corp. v. Commissioner, 85 T.C. 701 (1985).

139. 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

ultimately accrued to $1,825,000. The Cayman Islands Government had waived its bank secrecy law immediately prior to production to comply with the subpoena. Of the entire fine, $100,000 alone was attributable to the four-day period between the lifting of a stay on the fine and the bank's ultimate production from the Cayman Islands. On appeal, the bank contended that the sanctions should not have been assessed against it with respect to the documents in the Cayman Islands, because compliance with the subpoena would have required it to violate Cayman Islands' bank secrecy laws. The Eleventh Circuit concluded, in light of section 40 of the *Restatement (Second)*, that the Cayman Islands' interest in bank secrecy could not outbalance the U.S. interest in finding criminal transactions in narcotics for purposes of criminal prosecution. The court expressly rejected the argument that the bank had suffered any hardship due to the conflicting demands of the United States and the Cayman Islands. Rather, it observed that the bank had chosen to do business in two jurisdictions with inconsistent laws, and must, therefore, choose how to meet conflicting demands.[140]

In re Grand Jury Proceedings, United States v. Bank of Nova Scotia[141] involved contempt of a grand jury subpoena. The Miami agency of a Canadian chartered bank was served with a criminal grand jury subpoena calling for production of records maintained at the bank's Miami branch or at any of its branch offices in the Bahamas and Antigua. The bank claimed, among other things, that the burden of procuring the assistance of Bahamian and other foreign officials should fall on the U.S. Government, rather than the bank. The court found that it was proper to impose sanctions on the bank for noncompliance with a grand jury subpoena. The court rejected the argument that comity required the United States to apply for judicial assistance from the Bahamian Government rather than seek enforcement of the subpoena. Indeed, the court found this argument to be one of several indications that the bank had failed to act in good faith. The court noted that, in comparison to requiring the bank to respond to the subpoena, "[a]pplying for judicial assistance . . . is not a substantially equivalent means for obtaining production because of the cost in time and money and the uncertain likelihood of success in obtaining the order. . . . The judicial assistance procedure does not afford due deference to the United States' interests."[142] The court held that in the absence of legislative or executive statements to the contrary, the interests of the United States in enforcing its tax laws in this case outweighed the privacy of Bahamian bank customers.

In *Minpeco, S.A. v. Conticommodity Services, Inc.*[143] the district court denied plaintiffs' motion to compel a defendant, Banque Populaire Suisse (BPS), to

140. 740 F.2d at 826-29; *see also* United States v. Chase Manhattan Bank, 584 F. Supp. 1080 (S.D.N.Y. 1984) (Hong Kong bank secrecy does not protect U.S. bank from compliance with tax summons).

141. 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

142. 691 F.2d at 1390-91.

143. 116 F.R.D. 517 (S.D.N.Y. 1987).

produce documents and answer interrogatories relating to Swiss bank accounts. In denying the motion, the court applied an analysis derived from section 40 of the *Restatement (Second)* and two other factors: the importance of the requested information and documents to the conduct of the litigation, and the good or bad faith of the party resisting discovery. It concluded that although BPS's prelitigation conduct evinced bad faith, more importantly, the requested discovery was less crucial to the litigation because of waivers of bank secrecy already obtained from other customers and the discovery obtained pursuant to those waivers. Therefore, on balance, the cost in international comity likely would exceed the benefit to the conduct of the litigation.[144] The court also noted that it was important, although not decisive, that BPS had settled with the plaintiffs during the pendency of the motion and was no longer a primary defendant in the litigation. While emphasizing that it was not saying that "issuing an order to compel is never appropriate in the case of a witness [as opposed to a party] in a civil suit," the court concluded it was less supportable to order BPS to violate Swiss law when it was in a position of a witness and a mere source of information vis-à-vis the plaintiffs.[145]

In *In re Sealed Case*[146] the district court found a bank (owned by the government of Country *X*), and a manager of the bank's branch in Country *Y*, in contempt for failing to comply with an order compelling them to respond to a grand jury subpoena. The D.C. Circuit affirmed the contempt order as to the manager but reversed the order as to the bank. The manager and the bank had refused to testify about the grand jury's targets' activities or to produce documents on the grounds that "to do so would violate Country Y's banking secrecy laws and subject the manager and the bank to criminal prosecution in Country Y."[147] The circuit court rejected the manager's argument that his fear of prosecution by a foreign country was sufficient to invoke his Fifth Amendment privilege against self-incrimination, because he could only be punished by the foreign country for testifying in the United States if he were to return voluntarily to the foreign country.[148]

Regarding the bank, the circuit court held that the district court erred in issuing a contempt order compelling the bank to act in violation of the laws of Country *Y*. The circuit court noted, however, that it was not deciding "the general issue of whether a court may ever order action in violation of foreign laws."[149] In

144. *Id.* at 529-30.

145. *Id.* at 530; *see also* Minpeco, S.A. v. Conticommodity Services, Inc., 653 F. Supp. 957 (S.D.N.Y.), *aff'd*, 832 F.2d 739 (2d Cir. 1987) (CFTC had failed to show the extraordinary circumstances or compelling need necessary to set aside protective order entered in earlier private action that barred plaintiffs from transmitting to any governmental agency material discovered by plaintiffs).

146. 825 F.2d 494 (D.C. Cir.), *cert. denied*, 484 U.S. 1027 (1987).

147. 835 F.2d at 495.

148. *Id.* at 497.

149. *Id.* at 498.

reversing the civil contempt order against the bank, the D.C. Circuit identified two important factors: (1) "these sanctions represent an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory"; and (2) the bank "is not itself the focus of the criminal investigation in this case but is a third party that has not been accused of any wrongdoing."[150] The court noted that the district court specifically found that "the bank had acted in good faith throughout these proceedings."[151] The court distinguished the two Eleventh Circuit *Bank of Nova Scotia* cases,[152] stating that in the first case the contempt order was directed against an American entity, and therefore, there was "doubt whether enforcement of the order would require violation of foreign laws on foreign soil."[153] Also, in both *Bank of Nova Scotia* cases, the trial courts had found that the contemners had not acted in good faith. Although the circuit court expressed misgivings about "the power to enter a contempt order like the one in this case,"[154] it emphasized that its holding could be different "[i]f any of the facts we rest on here were different."[155]

In *In re Sealed Case*,[156] while reversing the district court's decision holding a witness in contempt for failure to comply with a grand jury subpoena on other grounds, the D.C. Circuit rejected the witness's contention that the Swiss Mutual Assistance Treaty provided the exclusive means for obtaining company records that were maintained or generated in Switzerland. The court noted that "even if the [w]itness might face possible prosecution in Switzerland if he complied with the subpoena, he would only run that risk if he traveled to Switzerland voluntarily."[157] Despite the Swiss Government's objections stated in its amicus curiae brief, the D.C. Circuit agreed with other courts that "there is little doubt that '[a] United States Court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's views to the contrary.' "[158]

In *CFTC v. First American Currency, Inc.*[159] the district court ordered a Swiss bank's branch in Los Angeles, Union Bank of Switzerland (UBS), to produce all the information subpoenaed by the CFTC, including banking customer account records maintained at the Panama subsidiary of UBS. The court concluded that UBS had control over the documents and information located at its wholly owned subsidiary in Panama and, citing the *Rogers* case,[160] noted that "a court will not

150. *Id.*
151. *Id.*
152. *See* cases cited *supra* notes 140-41.
153. 825 F.2d at 498.
154. *Id.* at 498.
155. *Id.* at 499.
156. 832 F.2d 1268 (D.C. Cir. 1987).
157. *Id.* at 1283.
158. *Id.* (quoting *In re* Anschuetz & Co., 754 F.2d 602, 613 n.28 (5th Cir. 1985), *vacated*, 107 S. Ct. 3223 (1987)).
159. No. CV85-7871-WMB (C.D. Cal. 1990).
160. 357 U.S. 197 (1958).

be precluded from finding that a party had control over records because the failure to produce was due to fear of punishment under the laws of its sovereign."[161] The court also noted that the Ninth Circuit appeared to have taken a different approach from the D.C. Circuit in *In Re Sealed Case*[162] to compelling third parties that are not the focus of an investigation to produce documents, even when that might result in the third party contravening foreign law. The court considered the comity factors listed in both the *Restatement (Second)* and the *Restatement (Third)*, and concluded that balancing weighed in favor of compelling UBS to comply with the subpoena.

On February 1, 1991, in *In re Federal Grand Jury Proceedings*,[163] a federal grand jury issued a subpoena duces tecum to the UBS ordering it to produce certain records concerning Panamanian bank accounts maintained by its wholly owned Panamanian subsidiary, Union de Bancos Suizos, Panama, S.A. (UBS Panama). After "careful review of the record," the court ordered UBS to produce the documents. UBS claimed that if it complied with the subpoena, UBS (Panama) and its officials would be subject to criminal prosecution under Panamanian law, specifically article 89 of the Code of Commerce of Panama, which provides for a fine of approximately $100 and makes no provision for imprisonment. The U.S. Government's memorandum in opposition analyzed the facts of the case in light of the balancing analysis set forth in both the *Restatement (Second)* and *Restatement (Third)*. The director of the Office of International Affairs, U.S. Department of Justice, submitted an affidavit wherein he concluded that there were no mutual legal assistance treaties, tax treaties, or other similar agreements currently in force between the United States and Panama that might serve as an alternative to the subpoena for the United States to obtain the bank information. The U.S. Government also noted that the Eleventh Circuit has rejected the proposition that a subpoena should be quashed merely because compliance might subject the subpoenaed party to criminal sanctions in a foreign country.

In re the Matter of Tax Liabilities: John Does[164] stems from the attempts of the Internal Revenue Service (IRS) to obtain records related to fund transfers by Bank of America. The court issued a subpoena on June 14, 1988, requiring Bank of America to produce, among other things, records relating to fund transfers of $9,500 or more "to or from the Bahamas, the Cayman Islands, Hong Kong, the Netherlands Antilles, and Panama."[165] Bank of America substantially conformed to the terms of the subpoena except for documents from Hong Kong. The IRS moved the court to enforce the subpoena and to compel production of

161. CFTC v. First Am. Currency, Inc., No. CV85-7871-WMB (C.D. Cal. Jan. 18, 1990).

162. 825 F.2d 494.

163. No. Civ. FGL 90-2 (S.D. Fla. Apr. 3, 1991) (order denying motion to quash subpoena and ordering production of subpoenaed documents), *aff'd without opinion, In re* Grand Jury Proceedings, 946 F.2d 904 (11th Cir.), *reh'g denied en banc*, 948 F.2d 1298 (1991), *cert. denied*, 502 U.S. 1092, 112 S. Ct. 1163 (1992).

164. No. C-88-0137 MISC (N.D. Cal. 1992).

165. *Id.* (order granting motion to compel at 1) (May 24, 1991).

records from Bank of America's overseas offices, particularly those from Hong Kong. In its May 24, 1991, ruling, which granted the IRS's motion, the court held (1) that it had the power to order Bank of America to produce books and papers located beyond the territorial limits of the United States;[166] (2) that an exception to this rule had been carved out where the party required to produce the documents would be subject to sanctions for the violation of the law of a foreign state;[167] (3) that a court must balance numerous factors in deciding whether this foreign law exception should apply;[168] and (4) that under the facts of the case, the balance was in favor of the IRS.

Less than a year later, upon a motion by Bank of America to vacate or modify the previous order, and in apparent response to political intervention, the court reversed itself because of what it described as "new law and new facts" brought to its attention.[169] The governments of both the United Kingdom and Hong Kong were granted leave to intervene amici curiae. Prior to intervening, the Governor of Hong Kong invoked the provisions of the Hong Kong Protection of Trading Interests Act of 1980 (PTIA) and issued a special order thereunder on June 27, 1991, barring Bank of America from producing the Hong Kong records to the IRS without the customer's consent.[170] Moreover, the British Embassy in Washington issued a diplomatic note, which claimed that enforcement of the subpoena would "violate the sovereignty of the United Kingdom and as such would be contrary to international law and comity."[171] Although those arguments had been made to the court during its previous consideration of the case, the court reversed its prior ruling. The court stated that the *Restatement (Second)* had been refined by the *Restatement (Third)*, which provided a "more detailed list of factors for the Court's consideration," particularly whether the enforcement of the subpoena would "undermine" the foreign state's interests.[172]

B. SEC Ability to Compel the Production of Evidence in Civil Litigation

The matter of *SEC v. Banca Della Svizzera Italiana*[173] (known as the *St. Joe* case) provides the seminal example of the SEC's approach to foreign discovery where

166. *Id.* at 5 (citing SEC v. Minas de Artemisa, S.A., 150 F.2d 215 (9th Cir. 1945)).

167. *Id.* at 5-6 (citing United States v. Vetco, 644 F.2d 1324 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981)).

168. *Id.* at 6 (quoting the RESTATEMENT (SECOND) § 40).

169. See *supra* note 164 (order granting motion to vacate or modify the court's order of May 24, 1991, at 6) (Mar. 11, 1992).

170. Interestingly, the court opined that the order issued by the governor of Hong Kong was significant only for illuminating Hong Kong's strong interest in protecting the information, but that the Bank of America's possibly being subject to criminal prosecution if it violated the PTIA order (or that resulting sanctions would be a hardship on the bank) was of no moment in considering whether the subpoena should be enforced. *Id.* at 13.

171. *Id.* at 9.

172. *Id.* at 11.

173. 81 Civ. 1836 (MP) (S.D.N.Y.).

litigation cannot be avoided. *St. Joe* is the leading case where the SEC sought to learn the identity of a customer of a Swiss bank through a motion to compel under Rule 37 of the Federal Rules of Civil Procedure. The *St. Joe* case concerned common stock and options trading in St. Joe Minerals Corp. securities the day before the announcement by Joseph E. Seagrams & Sons of a proposed tender offer for all the outstanding shares of St. Joe at $45 per share, a $14 per share premium.

The SEC obtained a temporary restraining order freezing profits derived from the transactions at the U.S. office of a Swiss bank in the Southern District of New York, based upon: (1) the circumstances of the transactions; (2) the SEC's inability to learn the identity of the purchaser(s); and (3) the need to prevent the profits gained as a result of the allegedly violative transactions from leaving the jurisdiction of a U.S. court. Banca Della Svizzera Italiana (BSI), the Swiss bank through which the original order had been placed, refused to respond to litigation interrogatories or to reveal its customers.

The SEC moved for an order to compel discovery under Rule 37 of the Federal Rules of Civil Procedure. BSI countered that such disclosure would violate Swiss secrecy laws and subject it to civil and criminal liability in Switzerland. After a hearing on the matter, on November 6, 1981, the court granted the SEC's motion and ordered BSI to disclose its customers' identities.[174] Before the court order was signed, BSI obtained a waiver of Swiss secrecy laws from its customers and responded to the SEC's interrogatories. The court issued an opinion before compliance had been effected.

In its analysis, the court noted that under *Société Internationale v. Rogers* "a foreign law's prohibition of discovery is not decisive" of how a U.S. court must rule on an order to compel discovery.[175] Rather, the court emphasized its determination in this case that BSI had acted in bad faith. The court, therefore, balanced the *Restatement (Second)* section 40 factors and found that BSI had made deliberate use of Swiss nondisclosure laws to evade the U.S. securities laws on insider trading. By comparison, the court noted the overwhelming interest of the United States in this matter and stated:

> the strength of the United States interest in enforcing its securities laws to ensure the integrity of its financial markets cannot seriously be doubted. That interest is being continually thwarted by the use of foreign bank accounts. Congress, in enacting legislation on bank record-keeping, expressed its concern over the problem over a decade ago: "Secret foreign bank accounts and secret foreign financial institutions have permitted a proliferation of 'white collar' crime . . . [and] have allowed Americans and others to avoid the law and regulations concerning securities and exchanges . . . The debilitating effects of the use of these secret institutions on Americans and the American economy are vast." . . . The evisceration of the U.S. interest in enforcing its securities laws continues up to the present.[176]

174. SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 113 (S.D.N.Y. 1981).
175. *Id.* at 114.
176. *Id.* at 117 (citation omitted).

The court further observed that, because BSI played an active role in the transactions, and thus profited from the wrongdoing, it could be considered to have created the conflict in an effort to insulate itself from any application of U.S. securities laws. In this regard, the court noted that BSI itself could have U.S. liability as an agent for an undisclosed principal. The court concluded that "[i]t would be a travesty of justice to permit a foreign company to invade American markets, violate American laws if they were indeed violated, withdraw profits and resist accountability for itself and its principals for the illegality by claiming their anonymity under foreign law."[177]

The court's decision on the discovery request against BSI ultimately contributed to the SEC's successful civil action against the foreign purchasers of St. Joe securities. On June 3, 1986, the district court enjoined Giuseppe Tome, along with three Panamanian entities through which he traded, and an Italian broker-dealer and its principal who were Tome's tippees and purchasers of St. Joe stock and call options, from future securities law violations and ordered the defendants to disgorge unlawful profits.[178]

In *SEC v. Tome*[179] the district court, affirmed by the Second Circuit, found that Tome, an Italian securities professional with substantial business in the United States, exploited a confidential relationship with Edgar Bronfman, the chairman and chief executive officer of Seagrams, to obtain and misuse material, nonpublic information concerning Seagrams' planned takeover bid for St. Joe on March 11, 1981. Tome and his tippees bought large quantities of St. Joe call options and common stock the day before the announced takeover bid. After the commencement of an SEC investigation into the trading preceding the takeover announcement, Tome fled the United States and did not return.

Tome, an Italian national residing in Switzerland at the time of the trial, purchased the St. Joe securities through brokerage trading accounts maintained at BSI in the names of three Panamanian entities in which he had a beneficial interest. He also tipped his friend, Paolo Leati, a resident of Italy, and Lombardfin S.p.A., a foreign holding company and U.S.-registered broker-dealer formed by Leati.

The court found that Tome violated section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), and Rule 10b-5 thereunder, by misappropriating valuable corporate information, entrusted to him by Bronfman for the purpose of advising Bronfman and Seagrams, for his own benefit. The three Panamanian entities were found to be equally liable for Tome's violations. The identified tippee purchasers, Leati and Lombardfin, did not appear at trial, but were both found liable for violations of section 10(b) and Rule 10b-5.

The court also ordered BSI to pay into the registry of the court the proceeds

177. *Id.* at 119.

178. SEC v. Tome, 638 F. Supp. 596 (S.D.N.Y. 1986), *aff'd*, 833 F.2d 1086 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988).

179. *Id.*

from the illegal trading in St. Joe securities that had been frozen in BSI's account at Irving Trust Company at the outset of the case. BSI satisfied the judgment against it in November 1986. The defendants appealed from the district court's ruling; Tome's appeal was dismissed, however, under the fugitive from justice doctrine.[180] On November 20, 1987, the Second Circuit affirmed the district court's decision, and petitions for certiorari by the three Panamanian entities, Leati, and Lombardfin were denied on May 16, 1988.[181]

C. Resistance to U.S. Subpoenas for Lack of Personal Jurisdiction

Generally, personal jurisdiction has not played a significant part in actions to obtain enforcement of discovery orders in civil suits in the securities area because the discovery requests have been directed against parties to the lawsuit. In one case involving a criminal grand jury investigation, however, the parties litigated the matter of personal jurisdiction in discovery. Moreover, another case in the commodities area addressed the approach taken by the concurring opinions in *Asahi Metal Industry Co. v. Superior Ccourt of California, Solano County*,[182] regarding whether, even if the U.S. courts have personal jurisdiction, prudential reasons regarding discovery counsel against its exercise.

In *Marc Rich & Co. v. United States*[183] a Swiss commodities trader resisted a grand jury subpoena on the grounds that the court lacked personal jurisdiction over it. The court denied the trader's motion to quash and found the trader in civil contempt. On appeal, the Second Circuit affirmed, holding that the district court had both personal and subject matter jurisdiction over the appellant since the subpoena was properly served upon appellant's officers within the United States. The court determined that the district court had personal jurisdiction over Marc Rich & Co., A.G., the Swiss parent, through its wholly owned American subsidiary, Marc Rich & Co., Int'l, a New York corporation. It further determined that the district court had subject matter jurisdiction because the formation and furtherance of the alleged conspiracy to evade U.S. tax laws necessarily required some acts in the United States and "beyond dispute" would have had an injurious effect on the United States.[184]

ACLI International Commodity Services v. Banque Populaire Suisse[185] involved a commodities suit where four key witnesses lived in Switzerland and were not subject to the compulsion of a U.S. court. The district court granted a motion to dismiss on forum non conveniens grounds. The court expressly stated that "[t]he primary consideration supporting dismissal of this action on grounds of

180. SEC v. Tome, No. 86 Civ. 6192 (Nov. 25, 1986).
181. 833 F.2d 1086 (2d Cir. 1987).
182. 480 U.S. 102 (1987).
183. 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983).
184. 707 F.2d at 667-68.
185. 652 F. Supp. 1289 (S.D.N.Y. 1987).

forum non conveniens is, as noted above, the incapacity of this court to compel the live testimony in New York of the four key witnesses to the alleged acts of fraud."[186]

D. Efforts to Compel Waiver of Foreign Law

Courts in the United States and in other countries have demonstrated irritation with parties and stakeholders who, in apparent bad faith, refuse to comply with judicial process on the basis of foreign law. Several courts, including the Supreme Court, have ordered persons subject to their jurisdiction to waive the aspects of foreign law they have interposed to shield them from cooperation with U.S. courts. Several appellate courts had rejected Fifth Amendment challenges to these waivers on the grounds that the waiver itself cannot operate as an admission that the evidence exists, or that it is subject to the party's control.[187] Another appellate court held that a signed consent to waive protection of foreign laws could be testimonial in nature, and, therefore, cannot be compelled without added protections.[188]

In *Doe v. United States*[189] the Supreme Court resolved the conflict among the courts of appeals concerning whether compelled execution of a consent form directing the disclosure of foreign bank records is inconsistent with the Fifth Amendment. Voting eight to one, the Court concluded that the court order compelling the petitioner to sign the subject waiver did not violate his Fifth Amendment rights.

The subject waiver in *Doe* "purported to apply to any and all accounts over which Doe had a right of withdrawal, without acknowledging the existence of any such account."[190] The Court concluded that the waiver was not testimonial "because neither the form, nor its execution, communicates any factual assertions, implicit or explicit, or conveys any information to the Government."[191] The Court noted that unlike the form in *In re Grand Jury Proceedings (Ranauro)*,[192] the subject waiver did not state that Doe "consents" to the release of bank records.[193] Rather, it stated that "the directive 'shall be construed as consent' with respect to Cayman Islands and Bermuda bank-secrecy laws."[194]

186. *Id.* at 1296; *cf.* Department of Economic Dev. v. Arthur Andersen & Co. (U.S.A.), 683 F. Supp. 1463 (S.D.N.Y. 1988) (motion to dismiss on forum non conveniens grounds denied in securities fraud action by foreign plaintiff against U.S. accounting firm and its foreign affiliates).

187. *See* United States v. Davis, 767 F.2d 1025 (2d Cir. 1985); United States v. Ghidoni, 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); and SEC v. Musella, 38 Fed. R. Serv. 2d (Callaghan) 429, Fed. Sec. L. Rep. (CCH) ¶ 99,516 (S.D.N.Y. 1983).

188. *See In re* Grand Jury Proceedings (Ranauro), 814 F.2d 791 (1st Cir. 1987).

189. 487 U.S. 201 (1988).

190. *Id.* at 204.

191. *Id.* at 215.

192. 814 F.2d 791 (1st Cir. 1987).

193. 487 U.S. at 216.

194. *Id.*

The Court in *Doe* noted, but did not address, "the international comity questions implicated by the Government's attempts to overcome protections afforded by the laws of another nation."[195] Notwithstanding the validity of a compelled waiver under U.S. law, a foreign jurisdiction might not accept such a waiver as sufficient authorization to release confidential records protected by the laws of its jurisdiction.[196] The following cases illustrate the development of the law in this area.

Courts in the United Kingdom have taken an approach similar to that espoused in *Ghidoni* and *Davis*. For example, in *Re: F.H. Lloyd Holdings P.L.C.*[197] a Luxembourg trust refused to provide an English public company with the name of its beneficial owner, as required by section 74 of the Companies Act of 1981, on the ground that provision of that information without the client's consent would subject it to criminal liability in Luxembourg. The Luxembourg trust challenged the British court's personal jurisdiction over it, particularly since one of the sanctions available in the United Kingdom for failure to produce ownership information is imprisonment. The Chancery Court rejected that challenge on the ground that the trust held English stock and, therefore, was subject to its jurisdiction. Accordingly, it directed that sanctions be levied against the trust.[198]

II. Court and SEC Responses to Efforts to Block Judicial Proceedings and to Defeat Efforts to Enforce Disgorgement and Penalty Orders

Parties to U.S. proceedings have sometimes sought the assistance of foreign courts to block the proceedings. In a 1988 insider trading case brought by the SEC the district court issued an order restraining the defendants from bringing certain actions in foreign courts, and used a sequestration order to protect funds from removal from its jurisdiction. U.S. courts also have ordered the repatriation of funds to the United States that have been transferred outside the United States. The antisuit injunction—an order from one court directing a party not to seek relief in another court or not to comply with orders of another court—is a device in considerable disfavor in the common law. Nevertheless, in several antitrust and tax proceedings, these injunctions have been obtained from foreign common law jurisdictions addressed to the parties' or witnesses' dealings with U.S. courts.

195. *Id.* at 218 n.16.

196. *Id.*

197. [1985] BCLC 293 (Eng. Ch. 1985).

198. On August 9, 1989, the Secretary of State for the Department of Trade and Industry issued orders under section 445 of the Companies Act of 1985 prohibiting the owners of five nominee limited corporations from transferring or voting their shares and prohibiting the payment to those nominees of any additional share dividends or other sums due from the company. The sanction was imposed after the entities refused to identify their beneficial owners during an insider trading investigation. In the Matter of the Companies Act 1985 and In the Matter of Consolidated Gold Fields plc, *reported in* THE WALL ST. J., Aug. 11, 1989, at A10.

Courts in the United Kingdom have taken similar approaches in seeking to recover foreign assets, for example, by affirming the issuance of injunctive orders on a worldwide basis even where the persons or entities subject to the order had no assets within the jurisdiction of the U.K. court.

A. Blocking Judicial Proceedings

In *SEC v. Wang and Lee*,[199] an insider trading action, the district court issued an order temporarily restraining the two defendants, pending the determination of the Commission's application for a preliminary injunction, "from commencing or maintaining any action, suit or other proceeding whether within or without the United States of America, with respect to any of the assets subject to the aforesaid Temporary Restraining Order."[200] The district court entered the order, at the SEC's request, when it learned that defendant Fred C. Lee, a Taiwan national residing in Hong Kong, was attempting to evade the court's asset freeze order by bringing an action in Hong Kong against a British bank that had refused to release funds to him after being served in the U.S. with the order.

The *Wang and Lee* case exemplifies the difficulties encountered with attempting to invoke a foreign court's jurisdiction to frustrate the subject of an action in a U.S. district court. In *Wang and Lee* the SEC alleged that Stephen Wang, an employee of a New York investment banking firm, sold inside information to Lee for trading purposes, and that Lee traded on the information through a series of nominee accounts both in the United States and overseas. At the time of filing the action, the SEC made an ex parte application for a temporary restraining order that included a freeze of all assets belonging to Lee, the companies he controlled, and his trading nominees. The SEC argued that a freeze order was necessary because Lee actively was attempting to remove his alleged illicit insider trading profits from the United States. The court granted the freeze order, which was served on all holders of Lee's assets, including Standard Chartered Bank, a British bank with branch offices in Hong Kong and New York. After the district court issued the restraining order, Lee demanded payment from Standard Chartered in Hong Kong and threatened a suit against the bank if the bank did not honor his demand. Standard Chartered refused to make payment based on the U.S. asset freeze order.

Upon being informed of Lee's actions in Hong Kong, which the SEC alleged constituted a contempt of the asset freeze order, the district court entered the antisuit injunction noted above. Lee then applied to the Supreme Court of Hong Kong for a declaration that the New York court order freezing his assets had

199. No. 88 Civ. 4461 (RO) (S.D.N.Y.).
200. *Id.* (temporary restraining order) (July 9, 1988).

"no effect whatsoever in Hong Kong" in restraining Standard Chartered from complying with demands for payment of the funds to Lee.[201]

Upon learning of Lee's violation of the antisuit injunction, which also constituted an effort to evade the asset freeze order, the district court, at the SEC's request, held a show cause hearing on the question of whether Standard Chartered's New York branch should be required to pay Lee's allegedly ill-gotten gains into the registry of the court for safekeeping. At the hearing, the SEC argued that it was necessary for the funds to be paid into the registry to protect the investors allegedly defrauded in the insider trading scheme. The bank contended that the court had no jurisdiction to require the payment of funds held in its Hong Kong branch. The district court held that it had jurisdiction over Lee, who had traded in the United States, and that the funds in question represented Lee's illicit profits. Accordingly, the district court found sufficient jurisdiction to issue an order on August 11, 1988, directing Standard Chartered Bank to pay the "full amount" of defendant Lee's assets (which totaled $12,499,879.15) into the registry of the court from accounts controlled by defendant Lee and two corporations of which Lee was president.[202] Standard Chartered paid the funds into the registry of the district court on August 15, 1988. Standard Chartered filed a notice of appeal from the August 11th order.[203]

Despite the district court's various rulings prohibiting him from pursuing his foreign causes of action and requiring the payment of funds into the registry, Lee continued to press his claims against Standard Chartered Bank in the Hong Kong Supreme Court. On September 22, 1988, the Hong Kong court, after a hearing on the matter, issued an order denying defendant Lee's application for a declaratory order against Standard Chartered.[204] The Hong Kong court, following a line of reasoning offered by the bank, concluded that Standard Chartered might be holding the funds as a constructive trustee for the benefit of investors defrauded by Wang and Lee, that such investors were the beneficial owners of those funds, and, therefore, Lee's companies were not entitled to delivery of the funds. Lee, who had initially filed a notice of appeal in the Hong Kong action, withdrew his appeal in December 1988.

On March 30, 1989, the SEC filed a motion for remand, or, alternatively, for supplementation of the record, based on documents newly produced by Standard Chartered Bank. The SEC argued that those documents provided evidence pertaining to the authority of the court to affect the Standard Chartered bank accounts, and that a remand was necessary to permit further discovery and the entry of additional findings by the district court. In an order dated April 13, 1989, the

201. Nanus Asia Co. v. Standard Chartered Bank and Southridge Int'l Inc. v. Standard Chartered Bank, Misc. Proc. No. 1459 and 1460 of 1988 (S. Ct. Hong Kong).

202. *See supra* note 199 (order of Aug. 11, 1988).

203. Appeal Docketed, No. 88-6236 (2d Cir. Sept. 9, 1988).

204. *See supra* note 201 (judgment dated Sept. 22, 1988) (Deputy High Court Judge Cruden).

Second Circuit denied the Commission's motion, concluding "that a remand should not be ordered at this point, prior to the bank's opportunity to argue the merits of its appeal."[205] The court further noted that, once the appeal had been heard, the merits panel would be in a better position to decide to affirm or reverse on the record or remand for further proceedings. Standard Chartered, as appellant, filed its brief on appeal on April 18, 1989, as did several amici curiae, including the U.K. Government and the Federal Reserve Bank of New York, each opposing the district court's order.

The bank attacked the district court's order on several grounds. Since the Hong Kong court refused to recognize the U.S. court order in discharge of the debt, the bank argued that the order effectively subjected the bank to double liability. Accordingly, the bank and amici contended that the order was an unconstitutional attachment or garnishment of the bank's own funds. In opposition, the Commission argued in its brief that the bank mischaracterized the court's order and that the order was in the nature of an equitable sequestration, which, unlike an attachment or garnishment, did not impose a lien on the sequestered property or in any manner affect title to that property. Consequently, the Commission contended that the order did not impose any risk of double liability.

The bank also challenged the court's authority to issue a garnishment order, arguing that the court's order garnished a debt localized in Hong Kong. The Commission in its brief argued that the court did not garnish property, but rather issued in personam orders that were necessary under the facts presented to give full effect to a final decree. Citing *United States v. First National City Bank*,[206] the Commission argued that such in personam orders were within the scope of the court's equitable jurisdiction in government enforcement actions. The bank and the amici also contended that the court's order ran afoul of international law and would upset the settled practices of the international banking community. The Commission stated in its brief, however, that the success of this argument depends on how the order is characterized and that, when viewed properly, the order did not impermissibly infringe on Hong Kong sovereignty, violate international law, or upset settled practices of the international banking community.

Furthermore, according to the Commission, there were two additional bases for the sequestration of $3 million. First, that sum constituted illegal profits that the defendant attempted to transfer outside the United States just before the Commission obtained the freeze order. Since the Commission was in hot pursuit of these funds, its ability to preserve those assets should not be thwarted by the fortuity of the timing of a bank transfer in relation to a freeze order. Second, it appeared that the $3 million may have been frozen in New York before it was credited to Lee's Hong Kong accounts.

205. SEC v. Wang, Nos. 88-6316, 88-6236 (2d Cir. Apr. 13, 1989).
206. 379 U.S. 378, 383 (1965).

On August 2, 1989, Lee consented to the entry of a Final Judgment of Permanent Injunction pursuant to which he surrendered $25,150,000, approximately $19 million of which equalled his alleged illicit profits, $1.5 million of which represented a penalty under the Insider Trading Sanctions Act, and $4.5 million of which represented taxes owed in the United States, to a court appointed receiver. Also on August 2, 1989, Standard Chartered Bank and the Commission jointly moved for voluntary dismissal of the bank's appeal. In addition, in furtherance of the settlement, the district court directed that the sequestered funds, and the interest thereon, be returned to Standard Chartered Bank.[207] The bank, pursuant to irrevocable instructions from Lee and the related account holders, paid the full amount returned, less $300,000 to resolve a dispute between Lee and the bank, to the court appointed receiver.

In a series of opinions dated July 6, 1984, and beginning with *Vanguard International Manufacturing, Inc. v. United States*,[208] Judge Sweet discussed the significance of preliminary injunctions issued in Hong Kong courts that prohibited third-party recordkeepers from complying with U.S. tax investigations. The court applied section 40 of the *Restatement (Second)*, and concluded that "[t]he vital interest of the United States in the enforcement of its tax laws prevails over Hong Kong's interest in maintaining the confidentiality of banking records."[209]

In an earlier opinion, *Garpeg Ltd. v. United States*,[210] the court denied an antisuit injunction against the moving party in Hong Kong because the issue before the U.S. court was not the same as that before the Hong Kong court. Indeed, the U.S. court could not adjudicate the issue of the applicability of Hong Kong bank secrecy laws that was before the Hong Kong court.[211]

B. Time Restrictions on the Freeze of Foreign Assets in the United States and Use of Default Judgments Against Unknown Purchasers to Obtain Discovery

Defendants and witnesses have resorted to a strategy of utilizing the U.S. courts to limit discovery and then forcing a trial before discovery is complete. Under such circumstances, it frequently is difficult for the SEC to prevail as plaintiff in litigated cases. The SEC, however, has made great strides in recent

207. *See supra* note 199 (order) (July 9, 1988); *see also* Derby & Co. v. Weldon, [1990] Ch. 65, [1989] 1 All E.R. 1002 (Eng. C.A. 1988) (Donaldson, M.R.) (affirming power of English court to grant an interlocutory *Mareva* injunction on a worldwide basis against both a Luxembourg and a Panama entity that had no assets within the jurisdiction of the court).

208. 588 F. Supp. 1229 (S.D.N.Y. 1984).

209. Garpeg Ltd. v. United States, 588 F. Supp. 1237, 1238 (S.D.N.Y. 1984).

210. 583 F. Supp. 789 (S.D.N.Y. 1984).

211. For an extensive discussion of the use and propriety of antisuit injunctions in an antitrust case, see Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984). *Compare* XAG v. A bank, [1983] 2 All E.R. 464 (Eng.).

years in developing responses to the litigation tactics of foreign and unknown defendants.

For example, the case of *SEC v. Unifund SAL*[212] involved alleged massive insider trading by foreigners in the securities of Rorer Group. The Commission moved quickly and obtained a temporary restraining order barring future violations of the securities laws, requiring the retention of unsold Rorer securities (and any proceeds from sold securities), and freezing the defendants' accounts. At the SEC's request, the district court issued a preliminary injunction that, among other things, extended indefinitely the freeze of the defendants' accounts. The Second Circuit subsequently complicated the Commission's ability to prove its case by limiting the asset freeze to a thirty day period from the date of the circuit court's mandate.[213] In practical terms, this provided the Commission only thirty additional days to obtain stronger evidence of its prima facie case before the defendants would be able to remove their assets from the United States, thereby eliminating a major incentive the defendants would otherwise have to respond to SEC discovery requests, and compromising the ability of the SEC to collect on any judgment that eventually might be obtained.

The appellate court's opinion focused primarily on the question of whether the evidence presented by the Commission sufficed to warrant the district court's issuance of a preliminary injunction. To the benefit of the Commission, the court rejected the district court's more stringent requirement that there must be some form of "strong *prima facie* case"[214] made by the Commission to justify a preliminary injunction and, in a lengthy discourse, concluded that "the test of sufficiency [of the *prima facie* case] varies with the nature of the relief sought."[215] That is, "the degree to which the Commission must show likelihood of success will be reduced where the interim relief sought is not especially onerous."[216] The SEC argued that the defendants prevented the Commission from obtaining the evidence necessary to prove its case by withholding discovery, such as failing to appear for depositions and not producing a single document until only four days before the preliminary injunction hearing. Moreover, the Commission was experiencing difficulties in obtaining documents and other information located in Switzerland and France. Nonetheless, believing that the Commission's showing on the merits was inadequate, the court vacated the portion of the district court's order that preliminarily enjoined the defendants from future violations of the securities

212. SEC v. Fondation Hai, 90 Civ. 0277 (SWK) (S.D.N.Y).

213. 910 F.2d 1028, *reh'g denied*, 917 F.2d 98 (2d Cir. 1990).

214. 910 F.2d at 1037.

215. *Id.* at 1040.

216. *Id.* The appellate court interpreted the SEC's request for a freeze order as a request for "ancillary relief to facilitate enforcement of any disgorgement remedy that might be ordered in the event a violation is established at trial," *id.* at 1041, and noted that "an ancillary remedy may be granted, even in circumstances where the elements required to support a traditional SEC injunction have not been established." *Id.*

laws. The court also upheld, but modified, the district court's order freezing the defendants' assets so that, among other things, it would expire thirty days from the date of the issuance of the appellate court's mandate.

In its petition for rehearing, the SEC argued that the time allotted by the court deprived the Commission of a fair opportunity to prove its case, especially given the complexity of foreign evidence gathering and the defendants' stonewalling tactics in response to the SEC's discovery demands. In support of its petition, the Commission submitted to the court a letter from the Swiss Federal Office for Police Matters (FOPM), the Swiss authority to which requests for assistance under the Treaty on Mutual Assistance in Criminal Matters Between the Swiss Confederation and the United States[217] (Swiss Treaty) are made. In the letter the FOPM stated that it could take a year or longer for the SEC to obtain evidence fully responsive to a request for assistance transmitted to the FOPM. The FOPM argued that "unreasonable discovery deadlines" could undermine international "cooperative efforts."[218]

The SEC further argued that evidence located in France could only be obtained through the Hague Convention. Hague Convention requests for information are required to be processed through several government agencies, and generally are subject to delay. The Commission also argued that neither the Hague Convention nor the Swiss Treaty impose any requirements that responding authorities furnish evidence in accordance with a prescribed schedule as announced by the circuit court, and that unreasonable discovery deadlines could have deleterious effects on achieving international enforcement cooperation. The court nonetheless denied the Commission's request for rehearing.[219]

SEC v. Heider (known as the *Contel* case)[220] was the first case in which the SEC sought and obtained a default judgment against unknown purchasers of securities. The SEC's ability to execute on such judgments in the United States removes one of the advantages that defendants have in avoiding the Commission's discovery requests, particularly those for the production of documents and other information located abroad. In addition, the Commission's ability to obtain such default judgments mitigates the negative impact of arbitrary discovery deadlines as established by the court in *Unifund*.

The *Contel* case stems from alleged illegal trading on inside information through accounts in Switzerland, Germany, and Luxembourg in the securities of Contel Corporation prior to the July 12, 1990, public announcement of an intended merger between Contel and G.T.E. Corporation. Some of the unknown purchasers had bought Contel securities through Swiss banks that, based upon

217. May 25, 1973, U.S.-Switz., 27 U.S.T. 2019.

218. Exhibit E to the Petition of the SEC for Rehearing as to the Duration of the Freeze Orders, Nos. 90-6057, 90-6091, 90-6093, 90-6103 (2d Cir. Aug. 1990).

219. 910 F.2d at 1028.

220. 90 Civ. 4636 (S.D.N.Y. 1990).

Swiss secrecy laws, had refused to identify their customers. The U.S. district court issued a temporary restraining order and an order freezing assets, and ordered the defendants to identify themselves to the court. Rather than identify themselves and defend the action, some of the defendants attempted to delay the processing of the Commission's request for assistance to the Swiss Government. On July 23, 1990, the district court entered a preliminary injunction and ordered assets of the unknown foreign purchasers frozen. On December 13, 1990, the district court denied motions by three of the defendants to dismiss the complaint for failure to state a claim and for failure to plead fraud with sufficient particularity.[221] On the failure to state a claim issue, the court held that the allegations in the complaint, if proved, would show the violations of law alleged to have occurred. The court noted that the defendants cited no case requiring the Commission to name the tipper in an insider trading complaint.

C. The Naming of Relief Defendants

Occasionally, persons who have not violated or are not suspected of having violated securities laws hold the assets of those who have or who are suspected of having violated securities laws. Where appropriate, the SEC names such persons as relief defendants (the SEC has, in the past, also used the term nominal defendants to facilitate collection of the property that is the subject of litigation).

In *SEC v. Cherif & Sanchou*[222] the SEC's complaint alleged that Danny O. Cherif misappropriated material nonpublic information from his former employer, First National Bank of Chicago (First Chicago), pertaining to significant corporate events involving certain U.S. issuers, and used that information to trade in the securities of those issuers. Cherif placed his trades through two accounts, one in his own name and one in the name of Khaled Sanchou, a resident of Tunisia. Cherif opened the Sanchou account using a $100,000 check signed by Sanchou and a power of attorney authorizing Cherif to trade in Sanchou's account. The complaint named Sanchou as a nominal defendant, but did not allege that Sanchou had violated U.S. securities laws.

The U.S. District Court for the Northern District of Illinois, Eastern Division, entered a preliminary injunction against Cherif enjoining him from future violations of sections 10(b) and 14(e) of the Exchange Act, including Rules 10b-5 and 14e-3 thereunder, and freezing his assets. The court also entered a preliminary injunction against Sanchou freezing assets in his bank and brokerage accounts in the United States. On appeal of the preliminary injunctions, the appellate court affirmed the preliminary injunction as to Cherif, adopting the misappropriation theory.[223] The appellate court remanded the issue of whether the preliminary

221. *Id.*

222. SEC v. Cherif, Civ. Action No. 89C 4204 (N.D. Ill.).

223. 933 F.2d 403 (7th Cir.), *modified, reh'g en banc denied*, 1991 U.S. App. LEXIS 11439 (1991), *cert. denied*, 502 U.S. 1071 (1992).

injunction was valid as to Sanchou's assets for further fact-finding to determine whether Sanchou could be considered a nominal (or relief) defendant. In its remand order, the appeals court defined a nominal defendant as "a person who can be joined to aid the recovery of relief without an assertion of subject matter jurisdiction only because he has no ownership interest in the property which is the subject of litigation."[224]

Alternatively, the court noted that the SEC might wish to amend its complaint to allege that Sanchou either violated or aided and abetted Cherif's violation of the securities laws. The court also found that Sanchou had waived the argument that the SEC's service of process on him in Tunisia was invalid.

On June 14, 1995, pursuant to Cherif's consent in which he neither admitted nor denied the allegations of the SEC's complaint, a Final Judgment of Permanent Injunction as to Cherif was entered by the United States District Court for the Northern District of Illinois, permanently enjoining Cherif from violating sections 10(b) and 14(e) of the Exchange Act and Rules 10b-5 and 14e-3 thereunder.[225] The SEC thereafter issued an order permanently barring Cherif from association with any broker, dealer, municipal securities dealer, investment adviser, or investment company.[226]

D. Court Repatriation Orders

On July 16, 1990, in the case of *SEC v. Eddie Antar*,[227] the U.S. District Court for the District of New Jersey entered final judgment against Eddie Antar for over $73 million.[228] Antar, the founder and former chairman, president, and chief executive officer of Crazy Eddie, Inc., had participated in a massive financial fraud and engaged in unlawful insider trading. For three consecutive years, Antar inflated the price of Crazy Eddie stock by fraudulently misrepresenting the financial condition of the company. Moreover, by using his position as chairman and president to overstate entries in Crazy Eddie's corporate books and records, Antar defrauded investors who bought shares of Crazy Eddie.

After filing its initial action against Antar, the Commission obtained evidence indicating that Antar had violated the court ordered freeze of his assets by transferring money to an account in Israel. As a result, upon a motion made by the SEC, the district court ordered Antar to repatriate and deliver to a court appointed

224. *Id.* at 414 (citation omitted).

225. *See supra* note 222; *see also* SEC v. Pacific Waste Management, Inc., No. CV-N-93-232-ECR (D. Nev.) (Apr. 21, 1993) (ancillary proceeding between the SEC and Dunne Finance Ltd., Royal Court of Guernsey (Ordinary Div.) (Channel Islands) (naming Dunne Finance Ltd. as a relief defendant and freezing its assets at a bank in Guernsey)).

226. Exchange Act Release No. 35935, 59 SEC Docket 2204 (July 5, 1995).

227. No. 89-CV-03773 (NHP) (D.N.J. Jan. 24, 1990), *aff'd*, 54 F.3d 770 (3d Cir. 1995); Litigation Release No. 12548, Fed. Sec. L. Rep. ¶ 95,341 (July 18, 1990).

228. This total consisted of disgorgement and prejudgment interest in the amounts of $52,529,548 and $20,976,884, respectively. *Id.*

receiver approximately $52 million transferred by Antar to bank accounts in Israel.[229]

E. SEC Actions to Recover Assets in Foreign Jurisdictions

The SEC has filed civil suits or taken other actions in foreign jurisdictions to collect or block funds ordered to be disgorged pursuant to U.S. judgments.

In the *Antar* matter, discussed above, an action brought by the SEC in London, England, to enforce its judgment against Antar, the High Court of Justice, Queen's Bench Division issued an injunction on July 8, 1992, freezing assets hidden by Antar in London.[230] On July 28, 1993, the High Court dismissed Antar's application to set aside the injunction. On January 21, 1994, the High Court rejected Antar's requests for an adjournment to appeal out of time an earlier judgment and for leave to amend his defense; entered judgment against Antar in the amount of $89,848,129;[231] and denied Antar's request for leave of court to appeal the decision. Upon reconsideration, however, on January 27, 1994, in an unpublished decision, the High Court granted Antar leave to appeal its January 21st rulings. Antar has sought leave of court to appeal the decision.

On April 13, 1993, in connection with the matter of *SEC v. Pacific Waste Management, Inc.*,[232] the SEC filed an ancillary proceeding in the Royal Court of Guernsey, Ordinary Division, against Dunne Finance, Ltd., a British Virgin Islands corporation, for the purpose of freezing Dunne's assets at a bank in Guernsey.[233] The Royal Court issued an order on April 15, 1993, that, among other things, froze, until further notice, all monies and assets up to the sum of $536,000 in the hands of the Guernsey bank and held in the name of Dunne. In the Guernsey proceeding, the first ever brought by the SEC in Guernsey, the SEC alleged that the stock of Pacific Waste Management, Inc., which was sold in the United States and Canada through fraudulent misrepresentations, emanated from shell companies incorporated in the British Virgin Islands and operated through a Guernsey trust company. The shares of the shell companies were owned by trusts held for the benefit of Bruno Victor de Vincentiis, a resident of Vancouver, British Columbia, and his family. The SEC further alleged that the shell companies were created to hold and then sell Pacific Waste stock through accounts at U.S. broker-dealers, and then to deposit the fraudulently obtained sales proceeds into various bank accounts in Guernsey. The sales proceeds were consolidated in a "money box" bank account in Guernsey in Dunne's name.

229. *Id.* For additional discussion of the *Antar* case, see *infra* notes 419-21 and accompanying text.

230. In the Matter of the Supreme Court Act 1981 and in the Matter of an Intended Action between the SEC and Eddie Antar, High Court of Justice (Queens Bench Division) (order) (July 8, 1992).

231. *See* SEC v. Antar, Litigation Release No. 13958 (Feb. 3, 1994).

232. No. CV-N-93-232-ECR (D. Nev.); *see infra* notes 379-81 and accompanying text.

233. SEC and Dunne Finance Ltd., ancillary proceeding, Royal Court of Guernsey (Ordinary Div.) (Channel Islands), Litigation Release No. 13617 (Apr. 21, 1993).

Finally, on September 1, 1994, the SEC filed a Statement of Claim in the Court of Queen's Bench of Alberta, Judicial District of Calgary,[234] against Pioneer International Holdings, Ltd., seeking to recover $606,258 in disgorgement and $127,328 in prejudgment interest that Pioneer Holdings had been ordered to pay pursuant to a final judgment and order of disgorgement issued by the U.S. District Court for the Western District of North Carolina on June 20, 1994, in the related U.S. action.[235] The Statement of Claim alleged that no funds had been paid to satisfy the U.S. district court's final judgment and order of disgorgement and that the Commission, by virtue of the judgment, had a vested right to receive monies ordered to be paid. On October 21, 1994, the Calgary court issued an order granting judgment in favor of the SEC in the amount of Can$995,405.27.

F. Changing Attitudes in Foreign Jurisdictions

The assertion of jurisdiction over allegedly illicit transactions that emanate from abroad but come to rest or have an effect in another regulator's territory have raised some of the most controversial issues to date. This controversy is particularly true where attempts are made to spirit the fruits of the suspected fraud out of the territory where the fraud occurred and the court with jurisdiction over the offense asserts jurisdiction over those fruits. These issues are complicated further by the ability to transfer the money electronically from one jurisdiction to another on a moment's notice. As noted above, U.S. courts have vigorously supported the efforts of U.S. regulatory agencies to assert jurisdiction over such ill-gotten gains. Two courts in the United Kingdom have adopted a similar approach.

In *Derby & Co. v. Weldon*[236] the plaintiffs brought an action against several defendants, including a Luxembourg company, C.M.I. Holding S.A., and a Panama entity, Milco Corporation, for fraud in connection with dealings in the cocoa market. The House of Lords held that an English court could grant an interlocutory *Mareva* injunction on a worldwide basis even where the entities subject to the injunction have no assets within the jurisdiction of the court. The opinion of Lord Donaldson, the Master of the Rolls, noted that one of the purposes of a *Mareva* injunction is to prevent defendants from taking action designed to frustrate subsequent orders of a court. It further noted that if to achieve this purpose "it is necessary to make orders concerning foreign assets, such orders

234. SEC v. Pioneer Int'l Holdings, Ltd., No. 9401-12203 (Ct. Q.B.), Litigation Release No. 14225 (Sept. 9, 1994).

235. SEC v. Moore, No. 5:93CV97-MU (W.D.N.C.), Litigation Release No. 13831 (Oct. 12, 1993). The SEC filed a complaint alleging that, from September 1990 through December 1991, the defendants sold shares of stock and certificates of deposit by making numerous misrepresentations and omissions to hundreds of investors throughout the United States and several foreign countries. The defendants fraudulently raised over $600,000. *Id.*

236. [1990] Ch. 65, [1989] 1 All E.R. 1002 (Eng. C.A. 1988) (Donaldson, M.R.), *reported in* THE TIMES (London), Dec. 26, 1988, at 28).

should be made, subject, of course, to ordinary principles of international law."[237] The court rejected the argument that the *Mareva* injunction was invalid because it could not be enforced in Luxembourg or Panama. Lord Donaldson considered the effect of the injunction on third parties and expressed concern that English banks "may have branches abroad and be asked by a defendant to take action at such a branch which will constitute a breach by the defendant of the court's order."[238] To overcome a charge that the court might be seeking to exercise "exorbitant jurisdiction," Lord Donaldson concluded that the injunction should contain a provision that would limit its extraterritorial effect to, among others, persons who are subject to the jurisdiction of the issuing court who have been given written notice of the order within the jurisdiction and who are "able to prevent acts or omissions outside the jurisdiction of this court which assist in the breach of the terms of this order."[239] Lord Justice Neill stated in his opinion that

> the time has come to state unequivocally that in an appropriate case the court has power to grant an interlocutory injunction even on a worldwide basis against any person who is properly before the court, so as to prevent that person by the transfer of his property frustrating a future judgment of the court.[240]

In *Securities and Investments Board v. Pantell, S.A.*[241] the Vice-Chancellor granted the Securities and Investments Board (SIB) *Mareva* relief restraining the defendant and its parent company from dissipating any of their assets within the jurisdiction of the court or in the Channel Islands. In addition, the SIB made a statement of claim under section 6 of the Financial Services Act of 1986 (1986 Act) to recover money from Pantell S.A., a company registered in Switzerland, and to redistribute it to persons who allegedly had been adversely affected by its activities in offering investment services in Great Britain.[242]

The SIB had sought *Mareva* relief to ensure that the assets of Pantell would not be dissipated pending a final determination by the court of the SIB's allegation that Pantell violated section 3 of the 1986 Act. Generally, United Kingdom courts may grant *Mareva* relief to an individual who sues under a private right of action for damages or other relief.[243] The Vice-Chancellor concluded that section 6 of

237. *Id.* at 79.
238. *Id.* at 82.
239. *Id.* at 87.
240. *Id.* at 93.
241. [1990] Ch. 426, [1989] 3 W.L.R. 698 (Eng. 1989), *reported in* THE TIMES (London), Mar. 10, 1989.
242. In October 1990 the SIB amended its statement of claim to include John Philip Roche, Julian A. Harris, and Shoosmith & Harrison (Pantell's solicitors) as additional defendants on the basis that they were persons "knowingly concerned" in Pantell's "contraventions," pursuant to § 6(2) of the Financial Services Act of 1986. SEC v. Pantell, S.A., [1991] 3 W.L.R. 857 (Eng. 1991). A July 1991 "application to strike out" (motion to dismiss) and a June 1992 appeal, made by these new defendants, were unsuccessful. *Id.*; SEC v. Pantell, S.A., [1993] Ch. 256 (Eng. C.A. 1992). Thus, the solicitors may eventually be ordered to repay sums paid to their client by investors.
243. Transcript of proceedings at 8, SIB v. Pantell, [1990] Ch. 426.

the 1986 Act conferred on the SIB a statutory right of action for the benefit of investors and that, therefore, the SIB was entitled to protection by *Mareva* relief in the same way as a person with a private right of action.[244] Because the Parliament had given the SIB a statutory cause of action, the SIB also should have incidental powers, such as the power to obtain *Mareva* relief, in order to prevent such a statutory right of action from being abrogated by the dissipation of assets.

Regarding the SIB's statement of claim against Pantell under section 6 of the 1986 Act, the SIB made application to the court on November 19, 1993, also under section 6, for "judgment in default of defence." As an integral part of this application, the SIB presented evidence in support of the Statement of Claim. In an order dated November 23, 1993, the SIB's application was granted and judgment entered against Pantell in the amount of £1,236,235.60.[245]

The SEC, like the SIB, has been provided with statutory causes of action that it can utilize to protect the rights of investors and to freeze assets for eventual distribution to defrauded investors. The *Pantell* decision suggests that a U.K. court may consider an SEC action to be a private cause of action in that, once final, the disgorgement by the defendant would be used to compensate the defrauded investors. Moreover, those investors could use a private right of action to obtain the same relief. The *Pantell* decision strengthens the argument that, because the relief sought would be similar to that available in a private action, a final judgment entered by the U.S. court could be regarded in the same way as a judgment obtained in a private right of action, and, therefore, it could be honored by the U.K. court.

244. SIB v. Pantell, [1990] Ch. 426.

245. High Court of Justice (Chancery Div.) (Ch. 1989 S No. 1859) (order) (Nov. 23, 1993).